IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 63927-7-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
KEITH DUANE BERRY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 19, 2010
	)	

Ellington, J. — Keith Berry challenges the trial court's finding that he is ineligible for a drug offender sentencing alternative (DOSA). Pro se, Berry also contends he received ineffective assistance of counsel. We find no error and affirm.

BACKGROUND

Based upon an informant's tip that Keith Berry was selling drugs, detectives from the King County Sheriff's Office and a Department of Corrections (DOC) officer stopped Berry at a gas station. Berry was arrested on a warrant for community custody violations. As the detective walked past the open trunk of Berry's car, he saw a bag containing approximately 26 grams of methamphetamine. The detective also found a bag containing an electronic scale and packaging materials for narcotics. Berry was arrested for violation of the uniform controlled substances act (VUCSA).

Berry admitted he planned to sell the methamphetamine and that the baggies and scale in the car were for that purpose. When the methamphetamine was tested by

the crime lab, it weighed 24.4 grams.

Berry pleaded guilty to VUCSA (possession of methamphetamine with intent to deliver) and requested a drug offender sentencing alternative (DOSA). The State opposed the request because the amount of drugs involved was not a "small quantity" as required under the DOSA statute.[1] The court agreed and imposed a standard range sentence.

DISCUSSION

Whether to grant a DOSA rests within the sentencing court's discretion.[2] "Generally, a standard range sentence, of which a DOSA is an alternate form, may not be appealed."[3] But a party may challenge legal errors or abuses of discretion, including the court's refusal to exercise its discretion.[4]

Berry contends the court abused its discretion and committed legal error by finding he was ineligible for a DOSA without considering all the "mandatory sentencing criteria."[5] We reject both his premise and his conclusion.

The DOSA statute provides that "[a]n offender is eligible for the special drug offender sentencing alternative if: . . . the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price and street value of the controlled substance."[6] The court apparently had no evidence concerning the purity, sale price,

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[1] RCW 9.94A.660(1)(d).

[2] State v. Smith, 142 Wn. App. 122, 129, 173 P.3d 973 (2007).

[3] State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003).

[4] Id.; see also State v. Gronnert, 122 Wn. App. 214, 225, 93 P.3d 200 (2004).

[5] Appellant's Br. at 4.

or street value of the methamphetamine. The court found that the weight of the contraband was inconsistent with a "small amount," and denied the DOSA.

Berry contends the statute mandates consideration of each of the listed criteria, not just weight. He particularly objects to the court's failure to consider the purity of the substance. But the language "as determined by a judge" explicitly leaves the decision to the trial court's discretion, and the phrase "such factors as" indicates that the enumerated factors are examples of characteristics trial courts should consider, not a mandatory list. Nowhere does the statute require the court to consider all of the listed factors.

Berry also suggests the court abused its discretion by failing to consider his unusually high drug tolerance and his argument that what appeared to be a large quantity was actually a small amount for his personal use. In fact, the record suggests the court considered this argument but found it inconsistent with Berry's admission that the drugs were intended for sale.[7]

The court committed no legal error by finding Berry ineligible for a DOSA based upon the weight of the drugs alone.[8]

In his statement of additional grounds for review, Berry offers several examples of offenders who purportedly received DOSA sentences despite having possessed

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[6] RCW 9.94A.660(1)(d).

[7] Report of Proceedings (RP) (July 31, 2009) at 10 ("How can you tell me it was for his use when he admitted to selling it?").

[8] While the substance was contained in one baggie, this does not prove it was a small quantity, especially when additional packaging materials and an electronic scale were also found. Further, methamphetamine may be purchased in quantities as small as a one gram. See State v. Bramme, 115 Wn. App. 844, 852, 64 P.3d 60 (2003).

greater quantities of controlled substances.[9] He contends this information establishes that the court violated his rights to due process and equal protection, and that trial counsel was ineffective for failing to alert the court to such examples.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial.[10] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[11] To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different.[12]

We do not find counsel deficient. Faced with a court obviously incredulous that Berry's offense involved only a small quantity of methamphetamine,[13] counsel acknowledged that amount was, "on its face . . . a large quantity of drugs."[14] He argued, however, that Berry's unusually high drug tolerance made 24 grams of

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[9] This information consists of other offenders' names, DOC numbers, and Berry's assertions concerning their offenses and convictions. We do not consider this information, which is outside the record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[10] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

[11] McFarland, 127 Wn.2d at 336.

[12] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

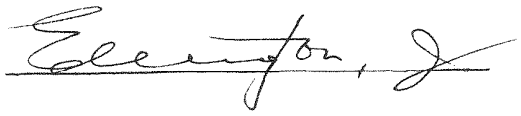
[13] RP (July 31, 2009) at 5 ("I have reviewed the file, you are going to have to convince me that 26 grams is a small amount (inaudible) real clear, that's the only issue I (inaudible).").

[14] Id. at 5; Clerk's Papers at 29.

methamphetamine a small quantity *for him*. Counsel supported the argument with information from Berry's social worker and mother about the genesis and progression of his addiction. Emphasizing the amount of drugs relative to Berry's tolerance was a legitimate trial strategy and does not demonstrate deficient performance.[15] Indeed, the court acknowledged that such an argument could be persuasive in some circumstances.[16] Because we do not find counsel's performance deficient, we need not reach the issue of prejudice,[17] on which Berry provides no argument in any event.

We also reject Berry's equal protection and due process claims. Even if Berry could demonstrate that some similarly situated offenders received DOSAs, this merely reflects the court's discretion in determining whether a given amount of a drug is a small quantity; it does not suggest discrimination on any basis, protected or otherwise. Here, the court made its determination after a hearing at which it heard from Berry, his mother, and his social worker, and then properly considered the relevant statutory factors. Berry received due process.

Affirmed.



WE CONCUR:

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[15] State v. Hendrickson, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996) ("[d]eficient performance is not shown by matters that go to trial strategy or tactics").

[16] RP (July 31, 2009) at 15 ("I think he could argue, depending on a person's use and tolerance what is a large or small quantity").

[17] State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007) (citing Strickland, 466 U.S. at 697).

Schindler, J Grosse, J